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Director

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Dear Human Resource Professionals, Managers and Employees:

This is about donations and pay. We are often faced with these issues when dealing with special entrance rates, optional pay, the recognition that we are treating similarly situated people differently for no rational reason, and various other pay matters. It is general principles I would like to share here. All fact situations cannot be addressed, but a working understanding of these principles will help resolve the myriad fact situations we face. The legal citations which support that which I am about to share will be given at the end, if you or your attorneys would like to read them.

DONATIONS AND PROPORTIONAL PAY

Generally stated, the State Constitution prohibits us from donating, or giving away, public funds. For our purposes, such a donation can occur in two sets of circumstances. The first occurs when pay or compensation given to an employee is disproportionate to that which is received by the giver, i.e. the taxpayer. What is or is not proportional is often in the eye of the beholder, but the limits placed on the exercise of discretion by appointing authorities can give guidance in fixing this proportional value.

Regarding optional pay, for example, an employer may pay up to ten percent of the employee's salary in a fiscal year for extra duties. If the Civil Service Commission had desired that ten percent be paid for all extra duties assigned, it would have said so, but granting discretion to pay between zero percent and ten percent highlights the requirement of the employer to proportion the value of the extra duties assigned to each employee within this ten percent range. Similarly, the rules on special entrance rates and exceptional qualifications allow an appointing authority to give a "percent difference" under certain circumstances. If the concept of proportional value is to be honored, the appointing authority must make a valued comparison between the new employee and current employees.

In summary on this point, the prohibition against donating public funds can be violated where the funds given are not proportionate to the value received. All of us would like to give all that we can to all employees, but the people of the state in their constitution have told us that they do not believe this is sound fiscal policy, but that proportional value must

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be achieved. The State Civil Service Commission acting on the discretion given it by those same people has sought to achieve that proportional value via the uniform pay and classification plan and its attendant rules, and that Commission, in turn, has given discretion to appointing authorities regarding pay in certain areas. It is incumbent upon appointing authorities to responsibly exercise that discretion in fixing proportional value in matters of pay.

DONATIONS AND RETROACTIVE PAY

Another way that we as HR Professionals can run afoul of the prohibition against donations is via retroactive pay. The principles here have their foundation in contract law. When we hire an employee we tell the employee that in exchange for performing a certain set of duties, for example, that of a Clerk 3, we will pay the employee a particular rate of pay. A deal, a contract, is made. When at some later point we then pay more for work already performed than we agreed to pay, we are donating public funds because we had no legal or contractual obligation to make that payment.

By way of example, where an employee is hired at the minimum of the pay range, but six months later learns of the Rule 6.5(g) and approaches his/her supervisor seeking more pay, giving an individual pay adjustment back to the date of hire would be a prohibited donation. The employee accepted the job at the rate of pay offered, and therefore had no expectation of receiving additional payment for the period of time he/she had already worked.

An obligation to pay, however, can be created based upon an uncertain event that may occur in the future. This is called a suspensive obligation because it is suspended pending the occurrence of an event in the future. When the event does occur, the obligation comes into being and is retroactive to the date the suspended obligation arose. The employee must know of this obligation, however, when he performs the work. That is, while the employee is performing the services the employee must be aware that if the future event occurs, the employee will receive a certain level of payment for the work being performed.

In our environment, of course, when an appointing authority at a higher level, the Civil Service Commission or the Director of the Department of Civil Service must approve certain payments, a period of time elapses between the decision at some level to seek this higher pay and the actual approval by either the appointing authority, the Commission, or the Director. Drawing on the principles above, we can go back retroactively only to the point where the employees were aware that this effort was being made on their behalf. In such a case, a suspensive obligation is created, i.e. if and only if the approval occurs in the future will pay be made. Without this suspensive obligation, going back retroactively in pay constitutes a donation. The notice to the employee need not be formal or in writing, and verbal notice is certainly enough.

Swimming through these principles of proportionate value and suspensive obligation is the concept of a rational basis related to a governmental interest. We have spoken of this often in the past, and it is a fundamental principle of all government action whether related to pay or otherwise. That is, every decision made by a government employee from the top to the bottom must have a rational basis related to a governmental interest. It is irrational to pay disproportionately, and it is irrational to pay for work already performed where there was no obligation to make such payment.

In summary so far, we can avoid the constitutional prohibition against donating public funds by insuring that our payments are proportional to the value obtained, that there is a legal obligation to make the payment, and that there is a rational business reason related to a governmental interest for making the payment at all.

DONATIONS AND DIFFERENT TREATMENT WITHOUT A RATIONAL BASIS

The other situation we sometimes face arises when we find that we are treating similarly situated employees differently for purposes of pay where there is no rational reason related to a governmental interest for doing so. An example of this might be when we have given one employee extra money for acquiring a masters degree in a particular field while through oversight we did not give the same pay enhancement to another employee in the same job who obtained the same masters degree. Another example occurs when we have worked someone in a higher job out of their classification without paying them. Obviously, we want to make things right, but we do not want to be guilty of offending the constitutional prohibition against donating funds.

As we know from past discussions, when we treat employees differently without a rational basis related to a governmental interest for doing so, we are violating such employees' constitutional rights. There are often situations where we do treat similarly situated employees differently, but there is a rational basis for doing so. An example of this would be where one of two Clerk 3's always calls-in sick on Friday or Monday so we require only this Clerk 3 to bring in a doctor's certificate for all such times. The reason we are treating the two employees dissimilarly is rationally related to a governmental interest, i.e. one appears to be abusing leave while the other one does not.

Where we violate constitutional rights by treating similarly situated employees differently without a good reason, then we have committed a tort. The prescriptive period for a tort is one year. That is, damages are retroactive for a one-year period. If our employee sued us now for violation of constitutional rights, the most the employee could recover would be pay for a one-year period.

Where we find discriminatory pay practices and where we are convinced that we have no rational basis related to a governmental interest for such discrimination, then we need not make our employees sue us before we can responsibly recognize our legal obligation to pay. This legal obligation is to cure the violation and payment may be retroactive for one year. There may be circumstances in which this one-year prescriptive period may not apply but these involve technical legal concepts. The decision about our liability for violating a person's constitutional rights is not one lightly made and is one that should always be made in conjunction with legal counsel. As discussed above, where that legal obligation truly exists, we do not offend the constitutional prohibition against a donation when we meet that obligation.

The citations are: **City of Port Allen vs. Louisiana Municipal Risk Management Agency**, 439 So.2d 399 (La. 1983); **State vs. Davis**, 539 So.2d 803 (La. App. 3rd Cir., 1989); **Varnado vs. Hospital Service District No. 1**, 730 So.2d 1066 (La. App. 1st Cir., 1999); **Williams vs. Orleans Parish School Board**, 560 So.2d 642 (4th Cir. 1990); **McElveen vs. Callahan**, 309 So.2d 379 (La. App. 3rd Cir. 1975); **Bouillon, et al., vs. City of New Iberia**, 657 So.2d 397 (La. App. 3rd Cir. 1995); Attorney General Opinions, 95-323, 94-241, 97-190, 99-137; **Nolan vs. Jefferson Parish Hospital Service District No. 2**, 790 So.2d 725, 733 (La. App. 5th Cir. 2001); **Brunette vs. Department of Wildlife and Fisheries et al**., 658 So.2d 618 (La. App. 1st Cir., 1996); **Jones vs. Orleans Parish School Board**, 688 F. 2nd 342, 344 (5th Cir. 1982).

Sincerely,

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